
CANADA / JUDGMENT

Hadley v. Pabla

2021 BCSC 238

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2021 BCSC 238 Hadley v. Pabla

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hadley v. Pabla,

2021 BCSC 238

Date: 20210216

Docket: M205169

Registry: New Westminster

Between:

David Howard Hadley

Plaintiff

And

Tajinder Singh Pabla and Rupinder Kaur Pabla

Defendants

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

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Place and Dates of Trial:

New Westminster, B.C.

January 25-28, 2021

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New Westminster, B.C.

February 16, 2021

Table of Contents

I. Introduction and Issues. 3

II. Background. 3

A. The Plaintiff 3

B. Treatment of Injuries Post-Accident 5

C. The Medical Opinion Evidence. 6

1. Dr. Barry Vaisler - Orthopedic Surgeon. 6

2. Dr. Steven Helper, Physiatrist 9

III. The Plaintiff's Injuries. 12

IV. The Defendants' Failure to Mitigate Argument. 14

V. Assessment of Damages. 16

A. Loss of Income or Income Earning Capacity. 16

1. Past Loss of Earnings or Earning Capacity. 20

2. Loss of Future Earning Capacity. 22

B. Non-Pecuniary Loss and Loss of Housekeeping Capacity. 27

1. Legal Principles. 27

2. Assessment - Non-Pecuniary Loss. 27

C. Costs of Future Care. 31

1. Legal Principles. 31

2. Assessment - Costs of Future Care. 31

D. Special Damages. 33

VI. Conclusion and Summary. 34**I. Introduction and Issues**

- [1] This is an assessment of damages arising from injuries suffered by the plaintiff, David Hadley, in a motor vehicle accident (the "accident" or the "MVA") that occurred August 29, 2017, in Abbotsford. The defendants admit liability.
- [2] The plaintiff was riding a motorcycle when the accident occurred. He was on his way home from work, in the afternoon. He was stopped for a traffic light, when he was struck from behind by a car driven by the defendant Rupinder Pabla. He was launched over the handlebars and landed on the pavement, striking his head, right shoulder, and leg - in particular, the right knee.
- [3] His only ongoing injury resulting from the MVA is chronic pain in his right knee. The other injuries sustained in the MVA soon resolved.
- [4] The major issue is the effect of Mr. Hadley's injuries on his past and future earnings and earning capacity.

II. Background**A. The Plaintiff**

- [5] Mr. Hadley was 28 years of age when the accident occurred. He is now 31. He resides in a basement suite together with his fiancée, Ms. Silka Delaney. In due course he and Ms. Delaney would like to purchase a single-family residence of their own, and to have children.
- [6] Mr. Hadley was born in Langley, British Columbia, but moved to Port McNeill on Vancouver Island as an infant, with his family.
- [7] He grew up with his three older brothers. They had a rambunctious relationship. He was active in sports, including hockey, martial arts, and various school sports. The family lived on a semi-rural property and Mr. Hadley was responsible for many physical chores, including maintenance of the property, taking care of the animals, and splitting and stacking firewood.
- [8] His parents separated when he was five years of age. His mother re-partnered. Mr. Hadley developed a very good relationship with his stepfather, John. He continued to have a relationship with his biological father, who worked as a fisherman. The plaintiff began working as a fisherman, initially with his father, seasonally, from the age of 12. He continued to work as a fisherman until the age of 22. As a youth he also worked with an uncle's company in forestry, doing heavy physical work such as building logging roads.

- [9] The plaintiff graduated from North Island Secondary School in 2007. He initially was interested in a career in the military, in particular with the Navy. He was interested in being a weapons engineering technician. He enrolled at North Island College in 2011, for a two-year program leading to a diploma as an industrial automation technician, which he achieved in 2013. His ambition to join the Navy was stymied as a result of elective surgery he underwent to address a hearing loss issue in his right ear.
- [10] He obtained excellent grades at North Island College. Before graduation, he was hired by an Abbotsford business, Accel Systems Inc. ("Accel Systems" or "Accel"). He moved from Vancouver Island to the Lower Mainland immediately upon graduation from North Island College in 2013. Mr. Hadley continues to work for Accel presently.
- [11] Accel is an electrical contracting company, primarily doing industrial and commercial construction and other electrical work.
- [12] Upon joining Accel Mr. Hadley began working towards a four-year apprenticeship as a construction electrician. The apprenticeship program requires at least 4,000 hours of relevant work hours, and has four periods and levels of training with examinations. Wages typically rise as an apprentice goes through the program and achieves the levels. Mr. Hadley completed the program in June 2018. He achieved a Red Seal, which means he is a Certified Construction Electrician (or journeyman), licensed to work as such anywhere in Canada.
- [13] Mr. Hadley's work at Accel consists of industrial or commercial electrical work, as well as working with automated industrial control equipment known as Programmable Logic Controllers ("PLC"). This work was often referred to in the evidence as PLC or programming work.
- [14] However, Accel has limited PLC work. Another somewhat more senior Accel Systems employee, John Duggan, is Accel Systems' main PLC programmer. He was hired several years before Mr. Hadley. Mr. Hadley is only given PLC work that Mr. Duggan is unable to do.
- [15] PLC work pays significantly more on an hourly basis, and is less physically demanding than general electrical work. Mr. Hadley prefers PLC work.
- [16] For the year leading to November 2020, Mr. Hadley primarily did PLC work, working for a major Accel client. However, Accel lost the PLC work of that client, who hired a PLC programmer in-house; thus, for the past two or three months prior to the trial, Mr. Hadley has reverted to primarily doing electrical work. He states that this has worsened his right knee pain.
- [17] He enjoys working for Accel Systems. He has a good relationship with his employer. He would like to continue his career with the company, if possible. However, he would like to do more PLC work and less general electrical work.

B. Treatment of Injuries Post-Accident

- [18] The plaintiff had no regular family doctor at the time of the accident. The day after the accident, on August 30, 2017, he saw Dr. Gregory Hart at a walk-in clinic in Abbotsford. He saw Dr. Sukhdeep Sidhu at Westview Medical Clinic in Abbotsford on several occasions in 2018 and 2019, and saw another doctor at the same clinic in early 2020. He was referred to an orthopedic surgeon, Dr. L. Soswa, who saw him twice, on November 6, 2018 and January 10, 2020, for his knee complaint. Dr. Soswa administered a cortisone injection to the plaintiff's right knee. The plaintiff had X-rays and MRI investigations of his knee.
- [19] The plaintiff was treated by physiotherapists on numerous occasions since the accident. Physiotherapy treatments generally occurred about twice per month until October 2019. Treatments diminished in frequency after that - the plaintiff has had eight physiotherapy treatments since October 2019.
- [20] Lately, the plaintiff has seen a counsellor, Inderjit Aujla, on four occasions, from November 2020 to January 2021, for issues related to mood, which he attributes to the MVA.

C. The Medical Opinion Evidence

- [21] The medical opinion evidence consists of two expert reports and associated oral testimony. The two reports are:
1. Independent medical assessment report of Dr. Barry Vaisler, orthopedic surgeon, who assessed the plaintiff February 25, 2020; and
 2. Independent medical assessment report of Dr. Steven Helper, physiatrist, who assessed the plaintiff September 24, 2020.
- [22] The reports of both doctors were adduced by the plaintiff. The defendants adduced no medical opinion evidence.
- [23] The medical opinions do not differ substantially.
- [24] In my view both medical experts were careful, thorough, and fair witnesses, and I have no reservations about accepting their opinions.
1. Dr. Barry Vaisler - Orthopedic Surgeon
- [25] Mr. Hadley informed Dr. Vaisler that he was experiencing daily intermittent aching in his right knee, along with intermittent sharp pains ranging from mild to occasionally severe. His knee pain was aggravated by weight bearing, squatting, going down stairs, standing up, and running.

[26] He informed Dr. Vaisler that at the time of the MVA he was working as an industrial and construction electrician. The work involved prolonged standing, bending, lifting, overhead work, and work in awkward or confined spaces. At the time of the assessment, his work involved more in the way of computer programming. In that respect, he had minimal limitations and was able to manage with his symptoms.

[27] Mr. Hadley also complained of experiencing daily mild to severe pain in his low back, arising spontaneously six to eight months before the assessment (therefore, sometime in 2019, approximately two years post accident).

[28] Dr. Vaisler opined as follows:

1. Mr. Hadley probably sustained contusions to his head, right shoulder, and right knee in the MVA. His persistent injury arising from the MVA is to the right knee;
2. The low back pain is probably unrelated to the MVA;
3. X-ray and MRI reports are consistent with early osteoarthritis of the right knee, likely brought on by wear and tear prior to the MVA;
4. Osteoarthritis probably rendered the plaintiff more vulnerable to increased pain and prolonged recovery following the blow to his knee;
5. But for the accident, it is probable that his right knee osteoarthritis would have remained asymptomatic for at least 10 to 15 years, and possibly indefinitely (that is, it possibly would have never resulted in symptoms);
6. It is probable that the MVA caused some articular cartilage injury to the right patellofemoral joint, at a microscopic level; and
7. It is unlikely that Mr. Hadley will develop progressive accelerated degenerative osteoarthritis of the right knee as a result of the MVA, but it is not possible to say for sure.

[29] Dr. Vaisler recommended treatment as follows:

1. A regular program of quadriceps strengthening, to build up strength and shock absorption effects, and to reduce subtle medial and lateral movements of the patella;
2. A gym pass for approximately six months, with an exercise program initially supervised by a kinesiologist or personal trainer;
3. Anti-inflammatory medications as necessary;
4. Use of custom orthotics to try to reduce lateral stresses across the patellofemoral joint;
5. Use of a commercial patellar stabilization brace, to be used initially with exercises and a graduated return to sports or other activities that aggravate his right knee pain; and

6. As his knee symptoms improve with the rehabilitation program, he could gradually wean himself from use of the brace, but may need to continue using the brace intermittently, as necessary, in the future.

[30] As to the degree of Mr. Hadley's disability, and as to prognosis, Dr. Vaisler opined:

1. When assessed, he was limited with respect to full postures involving squatting or kneeling;
2. Tolerance to prolonged walking, repetitive stair climbing, and walking on rough ground will probably improve with treatment as recommended, including use of the brace; and
3. He will probably be able to gradually return to sports and other leisure activities involving running and jumping, walking on rough ground, and martial arts, but he may not be able to return to the level he was performing at prior to the MVA, without intermittent use, as necessary, of the stabilization brace.

[31] Dr. Vaisler also referred to other treatment options, including platelet-rich plasma ("PRP") or stem cell therapy, as referred to by Dr. Helper, but noted that these treatments were still in the research stage, and the results were often variable and unpredictable.

2. Dr. Steven Helper, Physiatrist

[32] Although there are some differences, as noted, the medical opinions are largely consistent. Dr. Helper was able to review the report of Dr. Vaisler, which preceded his assessment.

[33] Mr. Hadley advised Dr. Helper that his primary complaint was of right-sided knee pain, which Mr. Hadley said was constantly present, and variable in intensity. The average intensity of his knee pain was between two and four out of ten during most daily activities, but could rise to eight out of ten, when aggravated. Intense pain was typically fleeting or momentary. Mr. Hadley stated that his knee pain was not improving or worsening. Mr. Hadley said that aggravating factors included any type of prolonged use, such as standing, walking, weight bearing, and vigorous activities, such as jogging. Crouching was also aggravating.

[34] Mr. Hadley told Dr. Helper that he had developed low back pain on the left side well after the MVA, but he was unsure whether this was related to the MVA. Low back pain averaged two or three out of ten, with occasional episodes of pain at an intensity of eight out of ten. Mr. Hadley denied a history of chronic or recurrent low back pain. However, Dr. Helper noted that chiropractic records from March 1, 2017 through April 18, 2017 (therefore, a few months prior to the MVA) showed complaints of right side neck pain and left side low back pain, described as moderate at the time.

- [35] Mr. Hadley informed Dr. Helper that he was independent with respect to activities of daily living and domestic work; however, he was bothered by knee pain. Mr. Hadley stated that his work involved duties as an electrician, and work as a PLC programmer. His injuries affected his work as an electrician more than they affected his PLC work. Recreationally, his activities were moderately to severely restricted. He had discontinued mixed martial arts and hiking, and had continued mountain biking and snowboarding at reduced levels.
- [36] Dr. Helper noted Mr. Hadley's complaint that his mood had suffered, and he described symptoms of depression and anxiety.
- [37] Dr. Helper opined as follows:
1. The leading diagnosis is patellofemoral joint pain, but Dr. Helper does not specify the precise physical cause of the pain;
 2. Mr. Hadley's knee complaints are caused by the accident;
 3. X-rays and MRI imaging show mild degenerative changes in the knee (osteoarthritic changes), likely predating the MVA;
 4. The osteoarthritic condition would not have caused functionally limiting knee pain, absent the accident;
 5. However (unlike Dr. Vaisler), Dr. Helper states that the presence of early arthritic changes at Mr. Hadley's age suggests a likelihood of knee symptoms of some sort during his working years, i.e., prior to age 65;
 6. He agreed with Dr. Vaisler's opinion regarding prognosis and recommendations for treatment;
 7. Lack of satisfactory improvement over the three years since the MVA is surprising and negatively influences the prognosis; however, Dr. Helper agrees with Dr. Vaisler that a new approach to Mr. Hadley's strength-based training is required;
 8. There is room for improvement in his medical condition, but a complete recovery is unlikely;
 9. In addition to the treatment recommendations of Dr. Vaisler (physical rehabilitation, knee brace, etc.), Dr. Helper suggests possibly attempting other treatments including:
 - a. viscosupplementation (injecting joint lubricants such as hyaluronic acid); or
 - b. injection with PRP.
 10. However, Dr. Helper noted that for either treatment, the goal was sustained symptomatic improvement, not joint restoration;
 11. Mr. Hadley's description of his work limitations are consistent with his condition;

12. Mr. Hadley will continue to be susceptible to escalations of knee pain with some recreational activities, such as running and high intensity hiking;
13. However, with rehabilitation and improvement in his physical condition, he should be able to return to moderate intensity fitness training, including increasing the frequency with which he is able to go mountain biking and snowboarding.
- [38] As to his mood issues, Dr. Helper suggested assessment by a psychologist.
- [39] Unlike Dr. Vaisler, on examination, Dr. Helper noticed mild warmth and swelling in the right knee.

III. The Plaintiff's Injuries

- [40] As a result of the MVA Mr. Hadley suffered contusions to his head, right shoulder, and right knee. Other than in relation to his right knee, his injuries resolved relatively quickly and uneventfully, without lasting consequences.
- [41] When Mr. Hadley was in Nelson, British Columbia from October to December 2017 for completion of his Level III technical training, he noted numbness in both hands, and also in his left foot. The numbness lasted for several days, but resolved completely.
- [42] Both Doctors noted no neurologic symptoms on their examinations, and were unable to arrive at a diagnosis for this complaint.
- [43] The medical evidence is that it is unlikely that Mr. Hadley would suffer any future tingling or sensory abnormalities as a result of the accident.
- [44] On the evidence, I am unable to conclude that the brief neurologic symptoms occurring in October 2017 were caused by or connected to the accident. As the symptoms disappeared quite quickly and there are no reasons to believe there will be any longer term consequences, they would not materially affect the assessment of damages, in any event.
- [45] I accept the plaintiff's evidence that prior to the MVA he was, generally, very healthy and fit. His work, particularly as an electrician, is quite physical. He was able to carry out that work without difficulty. He was active in numerous physical recreational pursuits, including mixed martial arts, snowboarding, downhill mountain biking, hiking, and hunting, and he worked out regularly at the gym.
- [46] I accept the plaintiff's evidence that after the accident, he suffered knee pain and stiffness, and difficulty walking, with bruising and swelling. The bruising and swelling was gone within a few weeks.
- [47] Since a few months after the accident, the plaintiff has suffered from chronic aching in the right knee, with intermittent and significant increases in pain, usually of short duration, with aggravating activities, including certain work activities, as well as certain recreational and domestic activities.

- [48] His knee pain has been fairly constant for a considerable period of time; that is, neither improving nor getting worse.
- [49] He describes his general level of pain as being approximately three out of ten, on a pain scale. This is subjective, but I accept that his general or consistent knee pain is mild to moderate in intensity.
- [50] The plaintiff had neck and low back complaints prior to the accident, which he tended to downplay in his testimony at trial and in his statements to the two IME doctors. At trial he stated that he had had a "twinge in his neck" prior to the accident. However, the records of the chiropractor he saw in March 2017, just a few months before the accident, indicate that he stated that he had suffered from chronic neck and low back pain for years, and that the neck pain had increased in frequency and intensity in the preceding few months.
- [51] He also told the chiropractor that his low back pain was frequent, and became apparent after moderate physical activities, including bending and lifting. He rated the neck and back pain as seven on a scale of zero to ten, in terms of pain intensity.
- [52] At trial, he said the neck pain had been alleviated prior to the accident and that the low back pain was intermittent. He said that he had not suffered from low back pain or any physical issues of any kind in the two months prior to the accident.
- [53] His low back pain is unrelated to the MVA, and was pre-existing. The condition is variable in intensity.
- [54] The prognosis for complete resolution of Mr. Hadley's right knee condition is negative. The knee pain is unlikely to completely resolve. However, the condition is likely to improve if the plaintiff follows the treatment recommendations of Drs. Vaisler and Helper. As he acknowledged to Dr. Helper, he needs to try a different rehabilitation treatment provider. As Dr. Vaisler states, the rehabilitation program should be conducted under the supervision of a kinesiologist or personal trainer, initially.
- [55] The plaintiff has used a knee brace for some time; however, the evidence indicates that the brace he has been using is not the perhaps more specialized and sophisticated commercial patellar stabilization brace that Dr. Vaisler recommended. He has also tried using an orthotic, but again, this may not be the specialized custom orthotic Dr. Vaisler recommended.

IV. The Defendants' Failure to Mitigate Argument

- [56] The defendants submit that the plaintiff has failed to mitigate his damages, as follows:
- a) failure to acquire a proper knee brace or to make reasonable inquiries about obtaining a proper knee brace; and
 - b) failure to follow the recommendations of Dr. Vaisler in his IME report.

[57] As to the relevant legal principles, I adopt my comments in *Walls v. Ocampo*, 2020 BCSC 499:

[143] I discussed the legal principles applicable to a defence argument of failure to mitigate in *Forghani-Esfahani v. Lester*, 2019 BCSC 332, at paras. 57 to 69.

[144] In this case, the defendants contend that the plaintiff failed to mitigate her loss in that she did not pursue medical and rehabilitation treatment as recommended by medical practitioners. Therefore the defendants must establish:

- (1) that the plaintiff acted unreasonably in eschewing the recommended treatment; and
- (2) the extent, if any, to which the plaintiff's damages would have been reduced had she acted reasonably: *Chiu v. Chiu*, 2002 BCCA 618, at para. 57.

[145] In order to meet the second part of the Chiu test for failure to mitigate, the defendants must, first, establish a real and substantial possibility that any part of the losses could have been avoided. If that is established, the court will assess the degree of probability that the loss or some part thereof would have been avoided, and assessed damages accordingly: *Forghani-Esfahani*, para. 69.

[146] In determining the reasonableness of a refusal to undergo recommended medical treatment, the trier of fact will take into account the degree of risk to the plaintiff from the treatment, the gravity of the consequences of refusing it, and the potential benefits to be derived from it: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, 1985 CanLII 62 (SCC), at para. 31.

[147] The court must consider the plaintiff's personal characteristics and circumstances in the analysis, including financial circumstances, using a subjective-objective test. To be relevant, these characteristics must rise to a level that reasonably explains the failure to mitigate; when a plaintiff has the subjective capacity to make reasonable decisions, the test for failure to mitigate is an objective one. The question is whether the plaintiff made contextually reasonable and sincere efforts to limit the loss: *Lynch v. Ueland*, 2018 BCSC 2144, at para. 51.

[148] It is appropriate to consider the issue of mitigation separately in respect of each head of damage: *Zawadzki v. Calimoso* 2011 BCSC 45, at para. 164.

[58] I reject the defence argument regarding failure to mitigate.

[59] Dr. Vaisler confirmed that he did not review his recommendations with the plaintiff in person. There was of course no reason to do so, as the plaintiff is not his patient. Therefore, the defence argument is that Mr. Hadley ought to have reviewed Dr. Vaisler's medical-legal report when he received it and ought to have acted upon it.

- [60] However, even if it could be said that the plaintiff ought to have done so, the report was prepared relatively recently, on March 6, 2020. Therefore, even if the plaintiff had conscientiously reviewed the report when he obtained it, or more reasonably, taken it to a family practitioner for further advice, the evidence does not establish the extent to which his condition could have been improved prior to trial. Dr. Vaisler and Dr. Helper were not asked to opine about this.
- [61] The plaintiff saw Dr. Helper's report for the first time in cross-examination at trial.
- [62] The plaintiff is hampered by not having a regular general practice physician. This is an unfortunate reality for many people today.
- [63] To the extent the treatment recommendations of Drs. Vaisler and Helper could now assist the plaintiff, that will be taken into account in the assessment of damages. Since there is no evidence that a delay of a few months would affect the chance of success of the recommended treatments, there is no room for reducing the damages for failure to mitigate.
- [64] As noted, the plaintiff has been using a knee brace for some time. The fact that the knee brace he has been using may not be of the type or sophistication that Dr. Vaisler recommended was not brought home to the plaintiff prior to trial.
- [65] In addition, I note that from a global perspective, the plaintiff has consistently obtained and followed medical advice and treatment throughout. The evidence as a whole does not support a finding that the plaintiff acted unreasonably.
- [66] I conclude that the defendants have not established that a deduction for failure to mitigate should be made.

V. Assessment of Damages

A. Loss of Income or Income Earning Capacity

- [67] The applicable legal principles are not in dispute.
- [68] I have taken the statements of relevant legal principles that follow from my decision in *Roemer v. Shafi*, 2020 BCSC 1:

F. Loss of Income or Income Earning Capacity

1. Legal Principles

- [81] I adopt the summary of the applicable legal principles I set out in *Sendher v. Wong*, 2014 BCSC 140 [Sendher], at paras. 158-163 (pre-trial loss) and 171-177 (future loss):

- [158] The award for past loss of earning capacity is based on the value of the work that the plaintiff would have performed but for her accident injuries. The award is properly characterized as a loss of earning capacity: *Bradley v. Bath*, 2010 BCCA 10 (CanLII) at paras. 31-32; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 (CanLII), at para. 153; *X. v. Y.*, 2011 BCSC 944 (CanLII), at para. 185.
- [159] The plaintiff need not establish the actual loss of earnings on a balance of probabilities. What would have happened prior to the trial but for the accident injuries is hypothetical, just the same as what may happen in the future, after the trial.
- [160] In *Smith v. Knudsen*, 2004 BCCA 613 (CanLII), at para. 29, Rowles J.A. stated:
- What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.
- [161] However the plaintiff must establish on a balance of probabilities that there is a causal connection between the accident injuries and the pecuniary loss claimed; mere speculation is insufficient: *Smith v. Knudsen* para. 36; *Athey*, at para. 27; *Perren v. Lalari*, 2010 BCCA 140 (CanLII), at para. 32; *Falati v. Smith*, 2010 BCSC 465 (CanLII), at para. 41, *aff'd* 2011 BCCA 45 (CanLII).
- [162] Just as in the case of the assessment of future loss of earning capacity, in the case of past loss of earning capacity, if the plaintiff establishes a real and substantial likelihood of the pecuniary loss asserted, the assessment of damages to be awarded as compensation depends upon an assessment of the degree of likelihood of the particular loss, combined with an assessment of the value of the loss.
- [163] In cases where it is appropriate to proceed with an assessment of the value of the loss, s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, stipulates that a person who suffers loss of income is only entitled to recover the net income amount as damages: *X. v. Y.*, at para. 187; *Lines*, at paras. 152-186.
- ...
- [171] The Court's essential task is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Gregory*, at para. 32. Insofar as possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's negligence: *Lines*, at para. 185.
- [Emphasis added.]

- [172] The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* (1985), 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353; *Pallos v. Insurance Corp. of British Columbia* (1995), 1995 CanLII 2871 (BC CA), 100 B.C.L.R. (2d) 260; *Pett v. Pett*, 2009 BCCA 232 (CanLII).
- [173] The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 (CanLII), at para. 18.
- [174] There are two possible approaches to assessment of loss of future earning capacity: the "earnings approach" from *Pallos* and the "capital asset approach" in *Brown*. Both approaches are correct and will be more or less appropriate depending on whether the loss in question can be quantified in a measurable way: *Perren v. Lalari*, 2010 BCCA 140 (CanLII), at para. 12.
- [175] The earnings approach involves a form of math-oriented methodology such as: (i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value; or (ii) awarding the plaintiff's entire annual income for a year or two: *Pallos*; *Gilbert*, [[2011] B.C.J. No. 1931] at para. 233.
- [176] The capital asset approach involves considering factors such as whether the plaintiff (i) has been rendered less capable overall of earning income from all types of employment; (ii) is less marketable or attractive as a potential employee; (iii) has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (iv) is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown*; *Gilbert*, at para. 233.
- [177] The principles that apply in assessing loss of future earning capacity were summarized by Low J.A. in *Reilly v. Lynn*, 2003 BCCA 49 (CanLII), at para. 101:
- [101] The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati*, supra, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), 1985 CanLII 179 (BC SC), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 (CanLII) at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 1995 CanLII 1971 (BC CA), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be

wrong: Milina v. Bartsch, supra, at 79. ...

[Emphasis added.]

[82] In Bhatti (Litigation Guardian of) v. Ethier, 2018 BCSC 1779 [Bhatti], I added:

[54] The use of economic and statistical evidence does not turn the assessment into a calculation, but can be a helpful tool in determining what is fair and reasonable in the circumstances: Grewal v. Naumann, 2017 BCCA 158 at para. 49, citing Dunbar v. Mendez, 2016 BCCA 211 at para. 21.

[55] As I will explain, in this case the capital asset approach is applicable. The following comments of Savage J.A. in Villing v. Husseni, 2016 BCCA 422 are relevant:

18 Using the capital asset approach does not mean the assessment is unstructured. I agree with Garson J.A.'s observations in Morgan v. Galbraith, 2013 BCCA 305:

[56] If the assessment is still to be based on the capital asset approach the judge must consider the four questions in Brown in the context of the facts of this case and make findings of fact as to the nature and extent of the plaintiff's loss of capacity and how that loss may impact the plaintiff's ability to earn income. Adopting the capital asset approach does not mean that the assessment is entirely at large without the necessity to explain the factual basis of the award: Morris v. Rose Estate (1996), 23 B.C.L.R. (3d) 256 at para. 24, 75 B.C.A.C. 263; Mulholland (Guardian ad litem of) v. Riley Estate (1995), 12 B.C.L.R. (3d) 248 at para. 43, 63 B.C.A.C. 145.

[Emphasis added.]

19 In every case where the capital asset approach is adopted, the four questions in Brown v. Golaïy (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.), form the basis of the assessment. The questions are whether:

- (1) The plaintiff has been rendered less capable overall from earning income from all types of employment;
- (2) The plaintiff is less marketable or attractive as an employee to potential employers;
- (3) The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
- (4) The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

20 The considerations in Brown are not intended to be exhaustive: Sinnott v. Boggs, 2007 BCCA 267 at para. 9, per Mackenzie J.A.

[69] Whether the plaintiff alleges loss based upon the loss of earnings approach or the capital asset approach, the plaintiff must prove that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then the plaintiff may prove the quantification of the loss on the approach that is most appropriate in the circumstances: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

1. Past Loss of Earnings or Earning Capacity

[70] The plaintiff contends that his past wage loss should be assessed at \$15,000 gross, or \$12,000 net, after applying a 20% tax rate. The defendants contend that the past loss of wages should be assessed at \$1,000, reduced by 20% for failure to mitigate, resulting in a net past wage loss of \$800.

[71] Accel Systems does not pay wages for time lost due to illness or disability.

[72] At the time of the MVA, the plaintiff was earning \$28.50 per hour. Overtime was paid at time and one-half, or \$42.75 per hour.

[73] The accident occurred on a Tuesday afternoon. Mr. Hadley was unable to work for the balance of the work week. The parties agree on loss of wages for three days, in the gross amount of \$770.64.

[74] Mr. Hadley returned to work on the following Monday. Initially, he attempted to confine his work to light duties, that were less physical in nature, such as working on electrical panels. However, light duties were not always available. His employer did its best to accommodate him with lighter duties, he said.

[75] Mr. Hadley testified that he attempted to return to work on full duties after a few months.

[76] He contends that while he has generally been able to work full time, he has lost work at times. He contends that he lost work on some occasions for medical reasons, such as attending his physiotherapy appointments. He explained that he was not always able to arrange for physiotherapy treatment in non-working hours.

[77] He contends that prior to the MVA he always worked full days. The standard work day is eight hours.

[78] He testified that he experiences pain at work, and sometimes has had to leave work early. He explains that when he leaves work early, he is not paid for hours not worked, and he loses the opportunity to work any overtime that might occur on an unplanned basis - for example, beyond the end of the scheduled work day.

[79] However, there is virtually no documentation of hours lost due to the injuries, or due to medical treatment.

- [80] Since there are virtually no actual records of time lost due to injury (other than the three days, and a reference to another two hours on a day in September 2017), the plaintiff could only refer to his records of hours worked in order to attempt to estimate time lost due to injury or treatment. In looking at his pay records, he asserted that, essentially, where any record shows that he did not work full hours, he must have left work early due to injury or treatment.
- [81] In general, I accept the plaintiff's evidence that there were times when his injuries resulted in him leaving work early, which are undocumented, and that it is likely that some overtime opportunities would have been lost on such occasions.
- [82] In general, the plaintiff was a sincere and straightforward witness, who did not tend to embellish his injuries, or the consequences thereof. However, some degree of caution is warranted. As noted, he tended to minimize his unrelated back injuries. He was somewhat argumentative on cross-examination. At times his explanations on cross-examination were difficult to follow, specifically, his explanations for apparently inconsistent or prejudicial evidence.
- [83] However, I accept the defence contention that in stating that virtually any time records showing less than full-time work indicate that Mr. Hadley lost work due to his injuries, the plaintiff was overstating the matter, and that there are other explanations on some occasions.
- [84] By reference to the work timesheets, Mr. Hadley testified to nine specific occasions spanning more than three years on which he lost wages due to his injuries. The plaintiff calculates those specific days as resulting in a loss of \$1,497.85. As noted, he also asserts that he would have also lost overtime on some days.
- [85] On the evidence, it is impossible to assess the actual wage loss prior to trial with any precision. In general, I accept the plaintiff's contention that he lost time from work beyond the occasions that he could specifically identify. Regrettably, he kept no proper records. In my view, \$10,000 is a fair and reasonable assessment of his past loss of earnings over the course of more than three years post-accident.
- [86] Reducing \$10,000 by 20% to account for taxes, the plaintiff's net past loss of earnings is assessed at \$8,000.

2. Loss of Future Earning Capacity

- [87] The plaintiff argues that, on the capital asset approach, in view of the factors set out in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) [Brown], a substantial award for future loss of earning capacity should be made. The plaintiff argues that the lost value of the capital asset can be estimated at 10% of the present value of Mr. Hadley's earning capacity to age 68, based upon \$100,000 per annum. He argues that an award of \$262,371 should be made, on this basis.

- [88] The defendants argue that the plaintiff has not established a real and substantial possibility of a future event leading to an income loss. The defendants argue that loss of earning capacity should be either zero, or, at best, \$40,000, based upon one-half year of income, approximately, reduced by 20% for the chance that pre-existing conditions (the low back injury, for example) could have reduced his working capacity, in any event.
- [89] In relation to establishing a real and substantial possibility of a future event (that is, a set of circumstances) that leads to an income loss in future, the plaintiff argues:
1. He may in the future have to leave work early due to pain from his injuries or for treatment, as in the past, and may lose the opportunity for overtime work;
 2. Since Accel Systems has limited PLC work, he might need to seek work with another employer. He is less marketable to other employers due to his knee injury;
 3. While his knee condition could improve, it could worsen;
 4. He has an increased risk of injury on the job; and
 5. Due to his injuries, there is an increased risk of unemployment.
- [90] I accept the plaintiff's evidence that electrical work is quite physically strenuous, in general. The work involves installing wiring and devices, accompanied with significant heavy lifting, pulling, climbing, use of ladders, and working in confined spaces while crouching. The work sometimes involves working at heights, and can be dangerous. Balance and stability are important.
- [91] PLC work is less strenuous. It involves installation of control devices and programming the devices.
- [92] As noted, during the last year, the plaintiff worked primarily doing PLC work, but that has changed in the last few months, due to Accel's loss of the PLC work of a significant client. Since Mr. Duggan has first call on the company's PLC work, Mr. Hadley receives only the leftover work, which currently is a small proportion of his work. He has noticed an increase in his knee symptoms since reverting to more of the general electrician work.
- [93] The defence argues that there is minimal evidence that the plaintiff has actually lost work to date. Leaving aside 2017 and 2018, during which the plaintiff was off work on apprenticeship training for significant lengths of time, the defence notes that the plaintiff's overtime hours increased in 2019 and 2020, as compared with 2016, the year prior to the MVA.
- [94] On the evidence overall, and taking into account all positive and negative contingencies, I accept that the plaintiff has established a loss of earning capacity. The loss must be assessed on the capital asset approach. However in my view only a modest award is justified.
- [95] I accept that if his knee symptoms do not substantially improve, then he will likely continue to lose some time from work, in the future, as in the past.

- [96] However I note that the plaintiff has not suffered a substantial loss of income to date. In fact, in 2016, the year prior to the MVA, he earned \$69,182. In 2018, he earned \$74,909, and in 2019, \$94,478. It appears that his income is quite variable and it is difficult to infer much from the figures alone. Also, in fairness, his income should have increased as his qualifications and experience rose, without the accident.
- [97] Mr. Hadley suffers from daily pain in the knee, which already restricts his ability to do his work to some degree. He continues to work, with pain, and with some limitation of function. This is more pronounced when he does electrical work than when he does PLC work. This can limit the number of hours that he can work in a day, and he is less capable of working overtime hours, or of working long hours on out of town jobs, which pay more and can offer overtime opportunities. Therefore, I accept that his capacity for working overtime doing electrical work is somewhat more limited than in the past, although this has not had much practical consequence to date. He may in the future be less able to do electrical work.
- [98] Although his employment with his current employer is secure, and the company is doing well, things could change.
- [99] On the other hand, there are a number of positive contingencies.
- [100] Mr. Hadley's knee condition may improve, with treatment.
- [101] I accept his evidence that the PLC work at Accel has largely dried up lately, for him. However, his PLC work could increase in future. According to Mr. Hadley himself and to Mr. Duggan, Mr. Hadley is very capable of doing PLC work.
- [102] Fortunately for the plaintiff, the PLC work that he prefers and for which he is better suited, in view of his knee complaints, pays substantially more on an hourly basis than does electrical work. Currently, the plaintiff earns \$36.00 per hour for electrical work and \$43.00 per hour for PLC work. (I note that the Agreed Statement of Facts says the plaintiff earns \$41 per hour for PLC work, but Mr. Hadley testified to \$43 per hour, and Mr. Duggan agreed with this figure, which I therefore find). In fact, Mr. Duggan, the more senior employee, who only does PLC work, earns \$52 per hour. Clearly the plaintiff has incentives to seek more PLC work.
- [103] The plaintiff offered hearsay evidence that Accel would not be seeking to increase its PLC work in the future. I am not persuaded that this is the case. I heard no direct evidence from Accel about this. This was news to Mr. Duggan. The evidence of Mr. Duggan was that his PLC work increased over a period of several years, until he was able to work exclusively in that field. This tends to indicate that the company's PLC work has increased with time. Accel is growing quickly. Mr. Duggan accepted the general proposition that automation of industrial processes is increasing. In short, I am not persuaded that the plaintiff's PLC work with Accel Systems might not increase in the future. There is no suggestion in the evidence that there is likely to be a shortage of PLC work generally in the future. Mr. Duggan noted there were several companies in the field. The fact that Accel's former client has hired a

PLC programmer in-house is some further indication of market demand.

[104] If Mr. Hadley's knee condition does not improve, and if the PLC work with Accel does not increase, the plaintiff has the option of seeking that work with another employer. If the plaintiff transitions to more PLC work, either with Accel or with some other employer, his income can be expected to increase.

[105] More broadly, the plaintiff has shown himself to be an industrious, intelligent, and adaptable worker. In my view there is a real likelihood that, with or without the knee injury, he would transition to a less physically demanding role, in which he could be expected to earn more income, such as management, or entrepreneurial self-employment. His stated ambition is to stay with Accel, a fast-growing company.

[106] In summary, while the four factors referred to in Brown point to some loss of earning capacity, and there are real and substantial possibilities of income loss in the future, the likelihood of substantial losses is low.

[107] I accept the defendants' submission that there was a measurable risk that Mr. Hadley's troublesome low back could have negatively affected his future earning capacity in any event. There was also some risk, according to Dr. Helper, that osteoarthritis of the knees could have affected his working capacity at some point in the future, although perhaps in the somewhat distant future. These are minor factors tending to reduce the assessment.

[108] There is no economist's evidence or vocational consulting opinion evidence to assist me in assessing the loss.

[109] There is no precise way to assess the loss. In such cases, sometimes the courts resort to awarding some proportion or multiple of the plaintiff's typical annual earnings: see *Mathews v. Noble*, 2020 BCSC 1499 at para. 70. This makes some sense, since the plaintiff's pre-accident or current earnings offer, at least, a starting point as to the value of the plaintiff's work capacity.

[110] The plaintiff's typical earnings are in the range of \$100,000 per annum. Taking all matters into account in this case, an award of one year's income would be too high, since there is a substantial probability the plaintiff will suffer only a small loss, and perhaps none at all. In my view, an award of \$50,000, based roughly upon one half of one year's income, is a reasonable estimate of the plaintiff's loss of earning capacity in future.

B. Non-Pecuniary Loss and Loss of Housekeeping Capacity

1. Legal Principles

[111] I adopt the summary of the applicable legal principles I set out in *Gillam v. Wiebe*, 2013 BCSC 565, at paras. 68-71.

2. Assessment - Non-Pecuniary Loss

- [112] The plaintiff submits that an award in the range of \$80,000-\$90,000 is appropriate for non-pecuniary damages. The defence submits non-pecuniary damages should be assessed at \$45,000-\$48,000, prior to any reduction for failure to mitigate (which I have rejected, as noted), inclusive of considerations relating to loss of housekeeping capacity.
- [113] The plaintiff submits that a separate pecuniary award for loss of housekeeping capacity of \$15,000 would be appropriate.
- [114] Mr. Hadley was a relatively young man, aged 28, when the accident occurred. He enjoyed a very active lifestyle. He was able to engage in mixed martial arts, snowboarding, aggressive downhill mountain biking, hunting, hiking, and other physical sporting and recreational pursuits without significant limitation. He was able to carry out his physically demanding work functions as an industrial electrician without difficulty. However, he had suffered from recurrent but intermittent low back pain. He also had undiagnosed and asymptomatic early osteoarthritis in the right knee, which could have become symptomatic at some point in the future, but possibly not until well into the future, and possibly not at all.
- [115] Mr. Hadley now suffers from chronic knee pain. The diagnosis is, generally, patellofemoral knee pain. The exact cause of the knee pain is not established in the evidence. It could be intra-articular cartilage damage, or it could be damage to the associated structures of the joint. The precise physical cause of the knee pain does not affect the assessment of damages for non-pecuniary loss.
- [116] His constant knee pain and discomfort is aggravated with certain activities that he encounters on a regular basis, such as work activities, and recreational activities. He has flare-ups of his knee pain with activities, and at times the pain can become quite severe.
- [117] Mr. Hadley has now endured this knee pain, discomfort, and mild disability for more than three years. The prognosis is generally negative. The pain and disability are unlikely to completely resolve. The injury may continue to affect him, for life. There are treatment options that should result in improvement. He should be able to participate in his previous activities, but with some limitations, and not to the same level as before. His injuries may somewhat limit his range of available work opportunities in future.
- [118] His family and social relationships are substantially unaffected. His fiancée Ms. Delaney testified that his injuries have not had a "huge impact at this point" on their relationship. However, Ms. Delaney has noted that he can be impatient, and is more irritable than he used to be. They bicker more frequently than they used to. Mr. Hadley avoids talking about the pain he might be suffering from.
- [119] Mr. Hadley has had difficulties with his mood, and has been seeing a counsellor. There is no specific opinion evidence about this matter.
- [120] Ms. Delaney has noted signs of pain when Mr. Hadley does home maintenance work outside, and his sleep is more fitful than it used to be.

[121] In the future, Mr. Hadley will have to limit his activities, generally. He will likely need to make use of a knee brace for a significant length of time, and perhaps, indefinitely, at least intermittently.

[122] In addition to *Stapley v. Hejslet*, 2006 BCCA 34, the plaintiff cites the following decisions, as guidance:

1. *Poulton v. Inderbosch*, 2010 BCSC 711 - the plaintiff was 33 years of age. She had ongoing pain and discomfort in her knee (likely patellofemoral knee pain) as well as ongoing pain in her neck and upper back, periodic headaches (diminishing somewhat over time), fatigue, anxiety, and depression. Non-pecuniary damages were assessed at \$70,000;
2. *Ali v. Fineblit*, 2015 BCSC 1494 - the plaintiff was 35 years of age at the time of the accident and working as a software architect. He suffered from a number of injuries, including ongoing chronic pain and limitations in his left knee and intermittent pain in his low back. Pre-accident he was very active physically. He was unable to return to many of his pre-accident activities. He was awarded \$70,000 in non-pecuniary damages; and
3. *Penner v. Silk*, 2009 BCSC 1682, rev'd in part on other grounds 2011 BCCA 135 - the plaintiff sustained various injuries, including to his neck and back, but the predominant injury was to the left knee. The injury had a major impact on his domestic, social, and recreational life and impacted his ability to carry out his duties as a general service manager. The non-pecuniary damages were ultimately assessed at \$80,000 (they were assessed at \$100,000 before taking into account the relevant contingencies, including the reasonable prospect that the plaintiff's condition could be significantly improved should he act on the recommendations made by the medical experts).

[123] The defendants cite the following decisions:

1. *Scarfe v. Fernco Developments Ltd.*, 2015 BCSC 2310 - non-pecuniary loss assessed at \$50,000 for injuries to the plaintiff's right shoulder and right knee suffered in a slip and fall accident; and
2. *Grudzien v. Hu*, 2013 BCSC 720 - \$50,000 non-pecuniary damage award for various injuries, including persisting low back and right knee injuries (the predominant ongoing injury being to his low back).

[124] In my view, the decisions cited by the plaintiff offer better guidance than those cited by the defence. An allowance must be made for the age of some of the decisions.

[125] Two other cases involving more significantly more serious knee injuries and consequences, and the need for surgery, are: (1) *Lanthier v. Ritchey*, 2019 BCSC 2022, in which \$120,000 was awarded, and (2) *Manky v. Scheepers*, 2017 BCSC 1870, in which \$125,000 was awarded.

- [126] Having regard to my findings, I accept the plaintiff's submission that \$90,000 is a reasonable assessment for non-pecuniary loss. I have taken the effects of the accident upon Mr. Hadley's housekeeping capacity into account in the assessment of non-pecuniary damages, and included in this figure is an allowance with respect to any losses in that regard.
- [127] As I noted in *Firman v. Asadi*, 2019 BCSC 270, at para. 235, the Court has discretion whether to address a claim for loss of housekeeping capacity as part of the non-pecuniary loss or as a segregated pecuniary head of damage. In *Riley v. Ritsco*, 2018 BCCA 366, at paras. 101-102, Justice Groberman added:
- [101] It is now well-established that where a plaintiff's injuries lead to a requirement that they pay for housekeeping services, or where the services are routinely performed for them gratuitously by family members or friends, a pecuniary award is appropriate. Where the situation does not meet the requirements for a pecuniary award, a judge may take the incapacity into account in assessing the award for non pecuniary damages.
- [102] I acknowledge what was said in *Kroeker* about segregated non-pecuniary awards "where the special facts of a case" warrant them. In my view, however, segregated non-pecuniary awards should be avoided in the absence of special circumstances. There is no reason to slice up a general damages award into individual components addressed to particular aspects of a plaintiff's lifestyle. While such an award might give an illusion of precision, or suggest that the court has been fastidious in searching out heads of damages, it serves no real purpose. An assessment of non-pecuniary damages involves a global assessment of the pain and suffering, loss of amenities, and loss of enjoyment of life suffered by a plaintiff. By its nature, it is a rough assessment and not a mathematical exercise.
- [128] Likewise, in *Kim v. Lin*, 2018 BCCA 77, Chief Justice Bauman held as follows:
- [33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.
- [129] The evidence does not justify a separate pecuniary award for loss of housekeeping capacity in this case. Mr. Hadley's limitations in relation to household capacity are limited. For the most part, he is able to carry out any chores or obligations that he performed prior to the accident, although he may need more time, and may suffer from pain. It is unlikely that any actual expense will be incurred for the foreseeable future, in my view.

C. Costs of Future Care

1. Legal Principles

[130] I adopt the statement of legal principles regarding costs of future care as set out in Sendher, at paras. 192-195.

[131] A concise recent summary of the applicable principles is set out in Gao v. Dietrich, 2018 BCCA 372 at paras. 68-70.

2. Assessment - Costs of Future Care

[132] The plaintiff submits that Mr. Hadley will incur future care costs comprised of:

- a) Physiotherapy, 24 times per year, at \$40 each - totalling \$960 per annum;
- b) Counselling 12 times per year, at \$120 each - totalling \$1,440 per annum;
- c) Over the counter pain medications - \$50 per annum; and
- d) Mileage expense - \$20 per annum.

Total annual care costs - \$2,470

[133] (The plaintiff's submissions erroneously added the claims to \$2,170 per annum).

[134] The plaintiff extrapolates these costs to age 75, at a 2% discount rate, with a multiplier of 29.08, to the sum of \$71,827.60 (after correction for the adding error referred to).

[135] The plaintiff submits that a further \$5,000 should be allowed for the possibility of PRP injections, stem cell treatments, or hyaluronic acid injections, as referred to in the evidence of Drs. Vaisler and Helper. The plaintiff also suggests that there is a possibility of arthroscopic surgery of the right knee, which should factor into the award of \$5,000 sought. Therefore, the plaintiff's submissions, after correction, are for an award of \$76,827.60.

[136] The defence contends that the evidence supports an award for future physiotherapy or active rehabilitation expenses, only. The defence argues that there is no evidence as to the cost that could be incurred for other treatments, or whether those expenses would be covered under public or private health care insurance. The defence makes no specific dollar amount submission in relation to costs of future care.

[137] I accept that the plaintiff will require active rehabilitation, and that supervision with a kinesiologist or personal trainer would be reasonable, in view of the importance of this treatment, and the plaintiff's lack of success with physiotherapy to date.

[138] Dr. Vaisler refers to a period of approximately six months. However, given that extensive past physiotherapy has had only minimal benefit, it is possible the therapy could take longer.

- [139] Dr. Vaisler recommends the use of custom orthotics, and a commercial quality knee brace at a cost of approximately \$250. The plaintiff's \$60 knee brace that he purchased at a drug store is inadequate. The plaintiff has used an orthotic in the past, but I think it unlikely that the orthotic he has used would be of the standard recommended by Dr. Vaisler, that is, customized in keeping with the medical opinions.
- [140] I also accept that the plaintiff will continue to require some counselling, at a minimum. Dr. Helper refers to the possibility of seeing a psychologist.
- [141] Mr. Hadley will also continue to incur some moderate expense for pain medications, and mileage.
- [142] However, the evidence does not support the need for any expense on a long-term basis as submitted by the plaintiff.
- [143] Bearing in mind the plaintiff's submission that the total annual care costs can be estimated at \$2,470, in my view, it is reasonable to allow \$10,000 for costs of future care. This equates roughly to the plaintiff's submissions for annual care costs, for three years, together with an allowance for the cost of the knee brace, orthotics, some pain medications, either some additional counselling or an assessment by a psychologist, and mileage costs.
- [144] I accept the submission of the defendants that no allowance should be made for the expense of possible injection therapies or stem cell treatments. These are possibilities only, and I have no evidence as to the amount that might actually be incurred.

D. Special Damages

- [145] The parties have agreed that special damages incurred attributable to the accident total \$4,044.94. Of this, the defence challenged \$995 paid for a private MRI. I am satisfied that it was a reasonable medical expense in the circumstances. Therefore, special damages are allowed at the sum of \$4,044.94.

VI. Conclusion and Summary

- [146] The plaintiff's claims are allowed in the following amounts:

Head of Damage

Award

- a. Past Loss of Earning Capacity

\$8,000

- b. Loss of Future Earning Capacity

\$50,000

- c. Non-Pecuniary Damages

\$90,000

d. Costs of Future Care

\$10,000

e. Special Damages

\$4,044.94

TOTAL

\$162,044.94

[147] I leave it to the parties to make any appropriate adjustments to the award. If necessary, they have liberty to apply in that regard.

[148] I note the parties prepared a useful agreed statement of facts, and an agreed chronology, which were both very helpful in making the trial and preparation of these reasons for judgment more efficient.

[149] The plaintiff is awarded costs, subject to the effect of relevant offers to settle.

"Verhoeven J."

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